IS A TELEGRAM WHICH ORIGINATES AND TERMINATES AT POINTS WITHIN THE SAME STATE, BUT WHICH PASSES IN TRANSIT OUTSIDE OF THAT STATE, AN INTERSTATE TRANSACTION?

SOME TIME ago the writer discussed at length the application of the United States Commerce Act to interstate telegrams.[1] In closing that discussion he briefly considered "whether or not the transmission of a telegram originating and terminating at points within the same state, but passing in transit beyond the limits of that state, constitutes interstate commerce." It is the purpose of this article to amplify that discussion by a consideration of additional authorities.

Neither the United States Supreme Court [2] nor the inferior Federal courts have passed upon the question so far as the writer knows, and so we are limited to reasoning from analogy so far as the Federal decisions are concerned. The question has been considered, however, by a few of the state courts.

At the outset, we must recognize and appreciate the distinction which the United States Supreme Court has drawn between the status of such a transaction for the purposes of taxation and for other purposes.

In Lehigh Valley R. Co. *v.* Pennsylvania,[3] the Pennsylvania legislature had imposed a tax upon receipts from certain railroad shipments between points in that state but passing in transit through a portion of New Jersey. The tax was imposed, however, only upon that portion of the transaction effected wholly within Pennsylvania. It was decided that the tax was valid as levied upon intrastate commerce, upon the authority of Ratterman *v.* W. U. Tel. Co.,[4] the court saying:

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[1] 2 VA. LAW REV. 98.

[2] Wherein consider W. U. Tel. Co. *v.* Hughes, 203 U. S. 505; W. U. Tel. Co. *v.* Wilson, 213 U. S. 52.

[3] 145 U. S. 192.

[4] 127 U. S. 411.

> "Whenever the subjects of taxation can be separated so that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the distinction will be acted upon by the courts, and the State permitted to collect that arising upon commerce solely within its own territory."

In Ratterman's case [5] it was said:

> "Where the subject of taxation can be separated so that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the State to collect that arising upon commerce solely within its own territory."

And in distinguishing the early case of Pacific Coast Steamship Co. *v.* Railroad Commissioners,[6] the writer of the Lehigh Valley opinion (Fuller, C. J.) clearly indicated in the following language the distinction to be had between taxation and other forms of state regulation of commerce:

> "But that case involved the direct taxation by a State of transportation which had passed beyond the jurisdiction of the State, and did not decide the question of the power of a State to tax its own corporations in respect of transactions within it in the course of a continuous carriage from one point to another in the State, in accomplishing which a part of another State was incidentally traversed."

In State *v.* U. S. Express Co.,[7] a taxation by Minnesota of express shipments between Minnesota points and passing outside of that state, was held to be valid upon that part of the earning derived from the exclusive Minnesota transportation--citing the Lehigh Valley case and stating that it validated only that portion of the tax which was levied upon the transportation effected within Pennsylvania.

And in Ewing *v.* City of Leavenworth,[8] the same question was again presented. There the city of Leavenworth had imposed a tax upon the entire business of the United States Ex-

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[5] *Supra.*

[6] 18 Fed. 10.

[7] 114 Minn. 346, 131 N. W. 489; affirmed, 223 U. S. 335.

[8] 226 U. S. 464.

press Company done in that city, "excepting the receipt, transmission and delivery of any such packages which are interstate commerce." It developed that about ten per cent. of the Company's business done at Leavenworth was between points in that city and other Kansas points, but which was necessarily routed over the Rock Island Railroad, which ran down the Missouri side of the Missouri River, with a branch line over into Leavenworth. After observing that the ordinance excepted interstate business, the court decided that the imposition of the tax upon that part of the express business which was wholly intrastate was valid, following the Lehigh Valley case,[9] and distinguishing the Hanley case about to be discussed.

It is patent, therefore, that the Lehigh Valley decision validated only that portion of the Pennsylvania tax imposed upon receipts from the transportation effected wholly within Pennsylvania, and that the distinction between taxation and other forms of state regulation of commerce was clearly recognized.

Hanley *v.* Kansas City Southern Ry. Co.,[10] just referred to, presented an attack upon the validity of a rate promulgated by the Railroad Commission of Arkansas and affecting shipments by the Railroad between points in Arkansas but passing in transit through Indian Territory. It was held that the action of the Railroad Commission was *ultra vires,* because the railroad transportation affected was interstate commerce, the court saying:

> "The transportation of these goods certainly went outside of Arkansas and we are of opinion that in its aspect of commerce it was not confined within the state;"

and quoting from Pacific Coast Steamship Co. *v.* Railroad Commissioners,[11] as follows:

> "To bring the transportation within the control of the state as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state."

The opinion then refers to the Lehigh Valley Railroad case in the following language:

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[9] *Supra.*

[10] 187 U. S. 617.

[11] *Supra.*

"That was the case of a tax and was distinguished expressly from an attempt by a state directly to regulate the transportation while outside of its borders. *And although it was intimated that for the purposes before the Court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes.* Moreover, the tax 'was determined in respect of receipts for the proportion of the transportation within the state.' Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. Mann *v.* Grand Trunk R. R. Co., 142 U. S. 217."

The preceding quotation was also embodied in the opinion in Ewing *v.* Leavenworth [12] where the Hanley case and the Lehigh Valley case are sharply contrasted and distinguished.[13] So this language in the Hanley opinion clearly emasculates the intimation in the Lehigh Valley opinion that the interstate character of a transaction is determined by the relation between the two ends of the transit; and would seem to establish, as the last word of the Supreme Court on the subject, that a transaction is interstate if the thing transported passes through the territory of two states, although its termini may be within the same state. And, as we shall see later, the Hanley case has been followed by the state court.

There is another and recent decision by the United States Supreme Court, which has some bearing on this general question, Kirmeyer *v.* Kansas.[14] There Kirmeyer had transacted a liquor business within the dry state of Kansas by maintaining a warehouse across the river in Missouri, filling orders there and making deliveries into Kansas, via a bridge into Leavenworth. The state sought to enjoin the continuation of the business, but the injunction was denied on the ground that the transactions involved were interstate commerce, notwithstanding the fact that Kirmeyer was "doing by indirection that which could not be done by ordinary and direct methods." The court seemingly

[12] *Supra.*

[13] See also, Wilmington Transportation Co. *v.* R. R. Commission, *infra.*

[14] 236 U. S. 568.

decided that the interstate character of the business was necessarily tested by the actual transactions involved.

Let us now examine the decisions of the various state courts of last resort and of the Interstate Commerce Commission upon this general subject. They may be roughly classified as railroad cases, telegraph cases and Interstate Commerce cases. We shall consider the three classes in the order named.

RAILROAD CASES.

This class of cases is interesting because of the analogy between railroad business and telegraph business; between the transportation of freight by rail and the transmission of intelligence by wire.[15]

In Louisville & N. R. R. Co. *v.* Allen,[16] the action was to recover from the shipper under charges upon certain shipments between points in Kentucky which passed in transit through a portion of Tennessee. In its decision of the case the Court of Appeals of Kentucky found it necessary to determine the interstate or intrastate character of the transactions involved, and decided that they were interstate commerce, citing the Hanley case and quoting therefrom as follows:

> "To bring the transportation within the control of the state as part of its domestic commerce, the subject transported must be during the entire voyage under the exclusive jurisdiction of the state."

In Patterson *v.* Missouri Pac. Ry. Co.,[17] the action was to recover the statutory penalty for the failure of the railroad to furnish plaintiff certain freight cars as requested. The proposed shipment was between Kansas points but passed through a portion of Missouri in transit. Although the court sustained the penalty statute as a valid exercise of the police power of the state, it held that the proposed transaction was interstate commerce, citing and discussing the Lehigh Valley and Hanley cases.

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[15] Wherein consider Pensacola Tel. Co. *v.* W. U. Tel. Co., 96 U. S. 1; W. Tel. Co. *v.* Texas, 105 U. S. 460.

[16] 152 Ky. 145, 153 S. W. 198.

[17] 77 Kan. 236, 94 Pac. 138, 15 L. R. A. (N. S.) 733.

And in the later case of Kirby *v.* Union Pac. R. Co.,[18] the same court decided the question squarely. The plaintiff had shipped a mare from Crescent, Okla., consigned to Hill City, Kan.; but at Selena, Kan., the shipper changed the address to Buffalo Park, Kan., and a new way bill was executed to that effect. The action was for damages to the mare shipped. It was held, however, that the transaction was interstate commerce, and that the Carmack Amendment validated the limitation of liability in the bill of lading. The opinion refers to the Lehigh Valley case, and then adds:

> "Ten years later the case of Hanley *v.* K. C. So. R. Co., 187 U. S. 617, decided that a transportation of goods from Ft. Smith, Ark., to Grannis, Ark., by way of the Indian Territory, on a through bill of lading, was interstate commerce and an attempt to apply the state rates of Arkansas to that transportation was properly enjoined."

The court then went on to say that, with the still greater extension of the law since 1902, it was considered clear that the instant transaction was interstate commerce, although the new contract consigning the mare to another Kansas point was effected within the state of Kansas.

In Hardwick Farmers' Elevator Co. *v.* Chicago R. I. & P. R. Co.,[19] similar facts were before the Minnesota Court, which held that the transportation of freight between Minnesota points but passing in transit out of the state was interstate commerce, upon the authority of the Hanley decision.

And before the Hanley case had been decided, the Minnesota Court had reached the same conclusion [20] on the authority of Lord *v.* Steamship Co.[21]

In Davis *v.* Southern Ry. Co.,[22] the action was for the statutory penalty for delay in transportation of freight between points in North Carolina but passing through South Carolina. It was held that the transaction was interstate commerce, and so outside of the scope of the North Carolina statute. The opin-

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[18] 94 Kan. 485, 146 Pac. 1183.
[19] 110 Minn. 25, 124 N. W. 819.
[20] State *v.* Chicago, etc., Ry. Co., 40 Minn. 267, 41 N. W. 1047,
[21] *Supra.*
[22] 147 N. C. 68, 60 S. E. 722.

ion cites the Lehigh Valley and Hanley cases and distinguishes the cases decided in deference to mistaken conclusions drawn from the Lehigh Valley case, "which involved only a question of taxation."

In Mires *v.* St. Louis & S. F. R. Co.,[23] the Missouri court decided that the Carmack Amendment validated the limitation of liability in a bill of lading providing for the transportation of mules between Missouri points but passing in transit through Kansas, citing the Hanley case.

Potter *v.* Kansas City So. Ry. Co.[24] also cites the Hanley case as deciding that a shipment between intrastate points but passing in transit through a foreign state constitutes interstate commerce.

Crescent Brewing Co. *v.* Oregon Short Line R. Co.[25] presented an attempt to compel the railroad to accept a shipment of liquor into dry territory on the ground that it was interstate commerce. The proposed transportation was between points in Idaho passing through a portion of Oregon. It was held that the transaction was interstate commerce, citing the Hanley case and the case of Pacific Coast Steamship Co. *v.* R. R. Commissioners,[26] and quoting from the latter opinion as follows:

> " 'To bring the transportation within the control of the state as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state.' "

In Traynham *v.* Charleston & W. C. Ry. Co.,[27] an action for a statutory penalty for delay in transportation of freight between South Carolina points, passing in transit through Georgia, was dismissed because the transaction involved was interstate commerce. The opinion was rendered on rehearing and reversed the former judgment of the court and cited the Hanley decision.

In St. Louis I. M. & S. R. Co. *v.* Spriggs,[28] the Arkansas Court followed the Hanley case to the effect that the state had jurisdiction over rates charged by the carrier for transportation

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[23] 134 Mo. App. 379, 114 S. W. 1052.
[24] 187 Mo. App. 56, 172 S. W. 1153.
[25] 24 Idaho 106, 132 Pac. 975.
[26] *Supra.*
[27] 92 S. C. 43, 75 S. E. 381.
[28] 113 Ark. 118, 167 S. W. 96.

between Arkansas points but passing out of the state in transit.

Wichita Falls, etc., Ry. Co. *v.* Asher,[29] was an action involving the rate charged by the railroad for the transportation of a car between Texas points but passing in transit through Oklahoma. It was held that the transaction was interstate commerce, the Court citing the Hanley case and saying:

> "It is settled law that transportation where traversing another state or a portion of same, though the points of origin and destination are in the same state, constitutes interstate commerce.'

In United States *v.* Erie R. Co.,[30] the court applied the automatic coupler act to cars transporting merchandise between points in the same state but passing in transit through another state, the Court saying (citing the Hanley case):

> "If merchandise be consigned from one point in a state to another point in the same state, but is in transit carried through a portion of another state, the transaction constitues interstate commerce."

TELEGRAPH CASES.

The first telegraph decision to be considered is that of W. U. Tel. Co. *v.* Sharp.[31] There the action involved a telegram from one point in Arkansas to another point in that state but passing in transit through a portion of Missouri. It is to be noted that there was no evidence in the record that the message could not have been sent wholly within Arkansas. The opinion refers to this fact, and recites that the "Company for its own convenience" routed it through Missouri, but adds the following dictum:

> "But even in a case where it is necessary to cross the borders of the state, it does not follow that that situation characterizes the transaction as an act of interstate commerce."

The opinion distinguished the Hanley case as an effort "to split up" a rate, referring to the recent decision of the United States Supreme Court in Wilmington Transportation Co. *v.* Railroad

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[29] (Tex. Civ. App.) 171 S. W. 1114.

[30] 166 Fed. 352.

[31] (Ark.) 180 S. W. 504.

Commission,[32] and then stating that there is no analogy between telegraphic transmission and freight transportation. The opinion argues that the reason for the rule in the Hanley case was that to permit the state of Arkansas to regulate the rate upon the Hanley shipment would be to permit every state through which the shipment passed to do so, and this objection does not obtain in the case of a telegram, for, like a wireless message, "there is nothing involved in such a service that affords opportunity for divided control;" and concludes (citing W. U. Tel. Co. *v.* Taylor,[33] W. U. Tel. Co. *v.* Reynolds,[34] W. U. Tel. Co. *v.* Hughes,[35] W. U. Tel. Co. *v.* Bilisoly,[36] State *v.* W. U. Tel. Co.):[37]

> "The control is with the state if the transaction of the message begins and in the same state; and in other event, it is with the Congress of the United States."

An examination of the decisions cited in this case will be instructive.

In Wilmington Transportation Co. *v.* R. R. Commission,[38] the point decided was that the California Railroad Commission had jurisdiction over the rates charged for freightage between the port of San Pedro on the California mainland and Catalina Island, also a part of California territory although some twenty miles out in the Pacific Ocean. The opinion bases the decision upon the proposition that although "the power of Congress extends to the subject of this controversy the fact remains that the power has not been exercised"—that is, although Congress has the power to assume charge of transportation by sea between points within the state, yet it has not exercised this power. Lord *v.* Steamship Co.,[39] and the Lehigh Valley case are cited as establishing the proposition that Congress has jurisdiction over such transportation as that carried on by the Wilmington Transportation Company; and the Hanley case is cited to the effect that as to any transportation by rail, beginning and ending in

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32 236 U. S. 151.
33 57 Ind. App. 93, 104 N. E. 771.
34 100 Va. 459, 41 S. E. 856.
35 104 Va. 240, 51 S. E. 225.
36 116 Va. 562, 82 S. E. 91.
37 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 213.
38 *Supra.*
39 *Supra.*

the same state but passing through foreign territory "the regulation of such rates can not be split up according to the jurisdiction of the respective states over the track." But it is then pointed out that in the instant case the California Railroad Commission was claiming:

> "The right to exercise its authority only as to transportation between the mainland and the Island, and solely with respect to such shipments over this route as are local to the state:"

and that *in the absence of congressional enactment,*

> "There is, in our judgment, no ground for saying that where the transportation is between two places in the same state it is less a subject for local action * * * because the voyage is over a stretch of open sea."

Bearing in mind that this case involved transportation by ocean between intrastate points it is seen that this decision in no way impairs the doctrine to be deduced from the Lehigh Valley and Hanley decisions.

W. U. Tel. Co. *v.* Taylor,[40] a decision by the Supreme Court of Indiana, is another case cited in the Sharp opinion. The action was one for the statutory penalty for failure to deliver a telegram from Shoals, Ind. to Evansville, Ind. via Cincinnati, Ohio. It was held that the transaction did not constitute interstate commerce because: first, the question was not properly presented in the record; and, second, apart from that consideration the record did not show that routing the telegram through Ohio was a necessary act and "the only route," as it was said appears in the Hanley case; and to permit the telegraph company to avoid the statute by wilfully routing intrastate messages outside of the state would be to emasculate the legislative enactment. It should be noted that in the Hanley case it does not positively appear that the interstate routing was necessary. But the Taylor opinion seems to admit that Hanley's case governs where the interstate routing of the telegram was absolutely necessary.

Another case cited in the Sharp opinion, is that of W. U. Tel.

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[40] *Supra.*

Co. *v.* Reynolds.[41] This was an action for a statutory penalty for the non-delivery of a telegram originating and terminating at points in Virginia but which was routed by the Company through West Virginia. The negligence complained of was the failure to transmit the message from a West Virginia relay point back to the Virginia destination. The Supreme Court of Virginia held that the transaction was not interstate commerce, saying:

> "Where the initial and terminal points are both in the same state and the telegram is transmitted over the wires of the same company and concerns only citizens of that state, the message is a domestic message and its character in that respect is not altered by the circumstance that the wire passes in part over territory of another state."

The court cited State *v.* W. U. Tel. Co.,[42] the Lehigh Valley case and W. U. Tel. Co. *v.* James.[43]

W. U. Tel. Co. *v.* Hughes[44] is another Virginia decision also cited in the Sharp opinion. There the facts were substantially the same as in the Reynolds case, and the opinion was by the same judge (Whittle). It was held that the Hanley decision did not overrule the Virginia doctrine announced in the Reynolds case, as the Hanley decision was simply a rate decision and the James case is still unimpaired. It is interesting to note that there was a strong dissent from the Hughes opinion (concurred in by Judge Keith) to the effect that the Hanley case should control the question before the court because the Hanley opinion states that the freight shipment there under consideration is an interstate transaction and there is no difference between the transportation of freight and the transmission of telegrams. The dissenting opinion refers to the decisions contra (e. g. North Carolina *v.* W. U. Tel. Co.[45]) as being based on the Lehigh Valley case, which does not apply.[46]

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[41] *Supra.* [42] *Supra.*

[43] 162 U. S. 650. This case only decided that a Georgia penalty statute was enforceable as to a telegram originating outside and to be delivered inside the state.

[44] *Supra.* See also 203 U. S. 505. [45] *Supra.*

[46] With all deference, the same criticism of this decision may be had which was applied by the English author, Judge Parry, in his book

W. U. Tel. Co. *v.* Bilisoly,[47] although cited in the Sharp opinion, has no application to the question we are discussing, as the message in suit was sent from New York City to Norfolk, Va., and the opinion simply applies the Commerce Act to this admittedly interstate transaction.

This brings us to the case of State *v.* W. U. Tel. Co.[48] In that case the North Carolina Railroad Commission in the exercise of its general regulatory powers over rates for the transmission of telegrams within the state, had ruled that telegrams originating and terminating at points in North Carolina, but passing in transit outside of the state, were intrastate transactions and subject to the jurisdiction of the Commission. It appeared that the telegrams in question were necessarily routed out of North Carolina in effecting prompt transmission between the points of origin and destination. On appeal the Supreme Court of North Carolina, upon the authority of the Lehigh Valley case, decided that the transmission of such messages did not constitute interstate commerce. It is to be noted that the Hanley decision was not handed down until some ten years after this North Carolina case was decided. And referring to this North Carolina telegraph case and other cases of similar import, the Hanley opinion says:

> "But these decisions were made simply out of deference to conclusions drawn from Lehigh Valley Railroad *v.* Pennsylvania, 145 U. S. 192, and we are of opinion that they carry their conclusions too far."

This reference indicates that the Supreme Court had telegraph cases in mind when the Hanley case was decided.

Although not referred to in the Sharp opinion, there is another recent decision of the Virginia Court upon this question, viz: W. U. Tel. Co. *v.* White.[49] This case turned primarily upon the applicability of the Virginia penalty statute to a tele-

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"The Law and the Poor," to the decision of the Supreme Court of the United States (five to four against the Statutes) in the first Workmen's Compensation case: "The counting of heads was against the statute. But the expression of the contents of the heads showed a resultant force of brain power in its favor."

[47] *Supra.* [48] *Supra.*

[49] 113 Va. 421, 74 S. E. 174.

gram between Virginia points but routed through Washington City, and it was held that the statute could apply, upon the authority of the James case, the Court saying:

> "It is not sought in this case to give effect to our statute outside of the limits of this State."

It is significant to note that the telegram sued on was admitted to be an interstate transaction in the following language:

> "Treating the message in question as interstate since its regular course from Staunton to Fredericksburg, in accordance with the regulations of the Company, was through the District of Columbia, though the message could have been transmitted from Staunton to Fredericksburg over the Company's lines entirely within this state, the statute affects the transmission of interstate commerce."

But it is decided that this statute was nevertheless applicable *because there had been no congressional legislation at that time affecting the subject.*

In the recent case of W. U. Tel. Co. *v.* Bassett,[50] the Supreme Court of Mississippi had before it this general question. The message in suit originated and terminated at Mississippi points, but was necessarily routed through the company's New Orleans office. It was contended by the telegraph company that the transaction was for that reason an interstate transaction and governed by the United States Commerce Act. The court overruled this contention because the contract for transmission was made in 1909 and the Telegraph Amendment to the United States Commerce Act was not passed until June 18, 1910, and "until the passage of this act no Federal Act was in force with reference to contracts of this nature and * * * therefore, the law of Mississippi controls in this suit." A judgment for compensatory damages was affirmed.

INTERSTATE COMMERCE COMMISSION CASES.

It is also interesting to note the attitude of the Interstate Commerce Commission upon this general question. Perhaps the leading decision of the Commission upon this question is found

[50] (Miss.) 71 South. 750.

in Milk Producers Association *v.* Delaware & Lackawanna R. R. Co.,[51] where it was held that shipments between New York points, but passing in transit through New Jersey, were subject to regulation by the Commission under the Commerce Act. The Hanley case had not then been decided when this decision was rendered, but the Lehigh Valley case was referred to and distinguished in the following language:

> "Whatever other or broader application may be given to language used from principles considered by the Court in that case, the decision was confined to the question of taxation on what was done or earned within the state. * * * If the state of Pennsylvania had attempted to regulate the aggregate charge or charges made for the entire transportation through different states, we think the court would have had an entirely different case to consider."

The same question was before the Commission in the recent case of West Virginia Rail Co. *v.* Baltimore & O. Ry. Co.[52] The matter was presented on petition to adjust rates between Huntington and various other West Virginia and Virginia points on the Norfolk & Western Railroad. The point decided may be ascertained from the following language of the opinion by the Commission:

> "The Norfolk & Western Railway Co., which assumed the burden of the defense, contends that transportation from points in West Virginia to destinations in the same state, is not within the jurisdiction of the Commission although for a short distance, about fifteen hundred feet, the traffic moves through the state of Kentucky. * * * It is pointed out that while the Supreme Court of the United States in Hanley *v.* Kansas City Southern Railway Co., 187 U. S. 617, has held that transportation, when the points of origin and destination are in the same state, is interstate commerce, where a large part of the route is outside of the state it is not held to be interstate commerce subject to the provisions of the act. * * * In this case it appears that shipments from Huntington to the points of destination in West Virginia pass outside of the state of West Virginia into Kentucky for about fifteen hundred feet, the most of which distance is covered by a tunnel. The Norfolk &

[51] 7 I. C. C. 92.

[52] 26 I. C. C. 622.

Western asserts that there never is any stoppage in transit of traffic moving over the fifteen hundred feet; that there is no place for delivery of freight; and that the mere incident of its passing over the fifteen hundred feet is not sufficient to bring the transportation between West Virginia points within the scope of the act. We are of the opinion, however, that shipments from Huntington to points in West Virginia here under consideration, are subject to the Act to Regulate Commerce and adhere to our previous rulings on this question."

Conclusion.

Let us briefly review the authorities we have considered above. In 1892 the Supreme Court of the United States decided the Lehigh Valley case and held valid the imposition of a tax by the state of Pennsylvania upon the receipts from that portion of a freight shipment between Pennsylvania points but passing in transit outside of the state which was effected exclusively within Pennsylvania. The distinction was clearly drawn between taxation and other forms of state regulation. This doctrine was affirmed by the same Court in the later cases of U. S. Express Co. *v.* Minnesota [53] and Ewing *v.* Leavenworth.[54]

Some ten years after the Lehigh Valley decision the Hanley case was decided by the same august body. This case decided that a state had no authority to regulate rates charged by a carrier for freight transported between points within that state but passing in transit outside thereof. The Hanley opinion carefully distinguishes and delimits the prior Lehigh Valley decision in these words:

> "That was the case of a tax and was distinguished expressly from an attempt by a state directly to regulate the transportation while outside its borders. And although it was intimated that for the purposes before the Court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax 'was determined in respect of receipts for the proportion of the transportation within the state.' "

[53] *Supra.*

[54] *Supra.*

And the fact that the Hanley opinion expressly refers to and disapproves of the North Carolina case holding that a telegram only passing temporarily out of the state was intrastate commerce, is a clear indication of the attitude of the Supreme Court to telegrams of this nature.

In the recent case of Kirmeyer *v.* Kansas,[55] the Supreme Court denied the right of the state to interfere with the defendant in error who was transacting an illicit liquor traffic by the simple expedient of routing his deliveries across the river out of, and then back into Kansas, thus "doing by indirection that which could not be done by ordinary and direct means." The court seemed to decide that the transaction was or was not within the regulatory power of the state, according to whether it was or was not interstate commerce, which must be determined by the actual transaction itself.

So, it is seen that the Supreme Court of the United States, the final arbiter of this federal question, has clearly decided that for the purpose of taxation, and for that purpose only, a state has control over the transportation of property through different states but originating and terminating in the same state. And it has also decided with equal clarity that for purposes other than taxation such transactions constitute interstate commerce, and as such are under the protection of the Federal Constitution and statutes.

The various state courts, including those of Kentucky, Kansas, Minnesota, North Carolina, Missouri, Idaho, South Carolina and Texas, and, at least, one inferior federal court, in railroad cases have followed the Hanley case and have recognized and approved the distinction drawn there and in the Lehigh Valley case, between taxation and other forms of state regulation. The judicial body best qualified, perhaps, to pass upon the interstate character of transactions is the Interstate Commerce Commission; and it has categorically decided that transportation of property between states but with the points of origin and destination in the same state constitutes interstate commerce and falls within the operation of the Commerce Act.

[55] *Supra.*

In telegraph cases several of the state courts have had occasion to pass upon the very question under consideration, and it must be admitted that all of those courts (Arkansas, Indiana, Virginia and North Carolina) have decided that such telegrams, viz: telegrams between points in the same state but passing in transit outside of the state constitute intrastate commerce, and are within the jurisdiction of the state courts and legislatures. Only the Mississippi Court (W. U. Tel. Co. *v.* Bassett,[56] which, by the way, is the last telegraph case on the subject) has intimated very clearly that the Commerce Act would apply to such a message if dated subsequent to the Telegraph Amendment of June 18, 1910, to the Commerce Act. But it is respectfully submitted that the reasoning of the former opinions is both illogical and unconvincing. They either grieviously misconstrue the Lehigh Valley case; or ignore the subsequent Hanley case, which itself disposes of the Lehigh Valley decision as authority in any except tax cases; or they attempt to draw an impossible distinction between railroad cases involving the transportation of property and telegraph cases involving the transmission of intelligence; or the decisions are obviously influenced by the fact that the records did not show that the interstate routing of the messages in suit was necessary.

The analogy between the transportation of freight or passengers by rail and the transmission of intelligence by wire is complete. In the words of Chief Justice Waite: [57]

> "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself."

It is established that for all purposes, save only taxation, transportation by rail between points in the same state but passing in transit through another state, constitutes interstate commerce. The conclusion is irresistible that the same ruling must apply to the transmission of telegrams. In those states, there-

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[56] *Supra.*

[57] W. U. Tel. Co. *v.* Texas, 105 U. S. 460.

fore, where the Hanley decision has been followed in railroad cases, the same result must obtain in telegraph cases—certainly where it appears that the interstate routing of the telegram was necessitated by either the absence of intrastate wires or the speed and convenience resulting from the use of an interstate route.

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